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9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ALASKA

12 UNITED STATES OF AMERICA for)
13 the use of POONG LIM/PERT)
14 JOINT VENTURE,)
15 Plaintiff,)
16 vs.)
17 DICK PACIFIC/GHEMM JOINT)
18 VENTURE, CONTINENTAL CASUALTY) Case No. A03-0290 Civil (JWS)
19 COMPANY, NATIONAL FIRE)
20 INSURANCE COMPANY OF HARTFORD,)
21 SEABOARD SURETY COMPANY, and)
22 ST. PAUL FIRE AND MARINE)
23 INSURANCE COMPANY,)
24 Defendants.)
25 _____

PLAINTIFF'S REPLY TO DPG'S
OPPOSITION TO MOTION FOR
RECONSIDERATION

19

20 I. ARGUMENT

21 A. Poong Lim's Obligation to Sejin Arises Out of the Scope of
22 Work in the Existing Contract.

23 In its order, the court asked the parties to consider
24 the applicability of *Great Western Savings Bank v. George W.*
25 *Easley Co.*, 778 P.2d 569 (Alaska 1989), to the liability Poong

1 Lim has to its detailing subcontractor Sejin, noting that in
2 *Great Western*, "the Alaska Supreme Court appears to have
3 approved a general contractor's recovering on its own behalf
4 amounts it owed but has not paid to subcontractors." In its
5 response to the court's observation, DPG makes much of the fact
6 that Sejin was allegedly compensated in full for its fixed price
7 contract and for the two change orders Sejin executed with Poong
8 Lim. However, DPG ignores that DPG's breach of implied
9 obligations not to hinder Poong Lim in turn flowed down through
10 Poong Lim to hinder Sejin's performance. This hindrance caused
11 breach of contract damages for which Sejin is entitled to
12 recover from Poong Lim, and Poong Lim is in turn entitled to
13 recover from DPG. DPG's argument that Sejin's fixed price
14 contract bars further recovery from Poong Lim is the same theory
15 that was rejected in the court's prior orders at Docket Nos.
16 130, 136, and 266, respecting DPG's argument that Poong Lim's
17 fixed price contract with DPG bars Poong Lim from recovering
18 breach of contract damages from DPG.

19
20 In its analysis of *Great Western*, DPG alleges that the
21 factor distinguishing that case from the present one was that in
22 that case, the issue was whether the contractor was entitled to
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1 damages for items of work which were included in the contract
2 with the owner or not. In this case, there is no substantive
3 difference to *Great Western*. Similarly to the claim asserted by
4 the contractor in *Great Western*, the impact claim for amounts
5 owing to Sejin included in Poong Lim's claim arises out of the
6 existing contract obligations owed to Sejin and breaches of
7 those obligations. The only "difference" between the present
8 case and that in *Great Western* is that the discrete costs
9 claimed under the change orders to the contract in *Great Western*
10 are more readily quantified than the impact claim to Sejin's
11 contract. The "difference" is legally irrelevant.

13
14 In the present case, the unrebutted fact is that Sejin
15 performed additional work in the form of uncompensated man hours
16 to fulfill its existing contract obligations to Poong Lim. The
17 additional work was required because of DPG's several breaches
18 of contract of its contract with Poong Lim that in turn hindered
19 Sejin's performance of its detailing subcontract with Poong Lim.
20 Poong Lim's agent has acknowledged in their testimony that Sejin
21 expended the additional man hours beyond what was expected and
22 has recently acknowledged in writing an obligation to compensate
23 Sejin. See Deposition of J. H. Lee taken March 23, 2005, at
24

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1 63:23-65:13, attached to Affidavit of Chris Butler as Exhibit 1;
2 Pass Through Agreement between Poong Lim Industrial Co., Ltd.
3 and Sejin, attached to Butler Affidavit as Exhibit 2. Sejin's
4 president believes that there was and is an agreement to
5 compensate Sejin for the additional man hours. See Deposition
6 of Y. S. Kim at 10:7-11:15, attached to Butler Affidavit as
7 Exhibit 3.

9 Poong Lim's experts have identified the impacts and
10 provided valuation for those additional man hours, and testified
11 on behalf of Poong Lim regarding these impacts. See Deposition
12 of Steven Schwartz, Vol. I at 11:4-17; 16:8-23; 19:8-13; 23:12-
13 24:6; 28:24-29:3; Vol. II at 245:15-249:19, attached to Butler
14 Affidavit as Exhibit 4; Deposition of Jordan Rosenfeld at 75:16-
15 77:3; 78:1-25, attached to Butler Affidavit as Exhibit 5. The
16 foregoing facts constitute more than adequate evidence from
17 which Poong Lim and Sejin's damages may be calculated. Despite
18 the fact that Poong Lim and Sejin had not, at the time of the
19 depositions last April, entered into a formal change order and
20 pass through agreement, Poong Lim's numerous judicial admissions
21 have established both entitlement and quantum for the
22 constructive changes to the contract, and the agreement set
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1 forth in the Pass Through Agreement in Exhibit 2 is sufficient
2 to establish a contract upon which Sejin may collect from Poong
3 Lim.

4

5 The measure of damages in Alaska for breach of
6 contract includes reimbursement of direct, consequential, and
7 incidental damages incurred in performing additional labor,
8 which was not originally required under the contract, but which
9 subsequently became part of the agreement. See *Apex Control*
10 *Systems, Inc. v. Alaska Mechanical, Inc.*, 776 P.2d 310 (Alaska
11 1989) (subcontractor permitted to recover for extra work
12 pursuant to a claim brought under a fixed price contract);
13 *Municipality of Anchorage v. Frank Coluccio Const. Co.*, 826 P.2d
14 316 (Alaska 1992) (Same); *Geolar, Inc. v. Gilbert/Commonwealth*
15 *Inc. of Michigan*, 874 P.2d 937 (Alaska 1994) (breach of contract
16 action where contractor sought recovery of increased cost of
17 performance under the contract). Given the numerous admissions
18 by Poong Lim regarding the existence, amount, and value of extra
19 work it required of Sejin, DPG's insistence that Sejin has
20 already been paid under its fixed price contract is contrary to
21 Alaska law. The above facts illustrate that Poong Lim has
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1 presented the requisite evidence of an outstanding contractual
2 liability to Sejin such that summary judgment is inappropriate.
3

4 B. Poong Lim's Pass Through Agreement with Sejin Precludes
5 Summary Judgment

6 In its opposition to Poong Lim's Motion for
7 Reconsideration, DPG relies upon the fact that no pass through
8 agreement exists between the Poong Lim and Sejin, its detailing
9 subcontractor. As noted above, Poong Lim and Sejin have
10 rectified this situation. The Agreement is a "legal obligation
11 for Poong Lim to Pay Sejin" upon recovery from DPG. Moreover
12 Poong Lim, by virtue of this agreement is the "real party in
13 interest" under DPG's definition. The Agreement provides a
14 contractual vehicle for Poong Lim to recover, on Sejin's behalf,
15 the additional costs Sejin incurred due to DPG's numerous
16 breaches of contract. Thus, the pass-through agreement brings
17 the Sejin claim within the Alaska law allowing pass-through
18 claims as stated in *University of Alaska v. Modern Construction,*
19 *Inc.*, 522 P.2d 1132 (Alaska 1974).

20 II. CONCLUSION

21 Poong Lim and Sejin have entered in to a binding
22 agreement whereby Poong Lim will seek compensation for the
23

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1 additional costs Sejin incurred due to DPG's breaches of
2 contract on Sejin's behalf. The impacts Sejin suffered have
3 been admitted by Poong Lim and identified, calculated, and
4 priced by Poong Lim's experts. Under the Agreement, Poong Lim
5 is obliged to pay Sejin based upon its recovery from DPG. All
6 for the foregoing are material facts which are sufficient to
7 preclude summary judgment.
8

9 Dated: April 10, 2006

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 10th day of
3 April, 2006, a true and correct copy of
3 the foregoing was served electronically
3 on:

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